STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM JOHN ROBERTSON,

Defendant-Appellant.

UNPUBLISHED
September 20, 2002

No. 232385
Oakland Circuit Court
LC Nos. 99-169725-FC;
99-169726-FC

Before: O'Connell, P.J., and Griffin and Hoekstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a). He was sentenced to two concurrent prison terms of nine to fifteen years. We affirm.

Defendant first argues that the trial court erred when it denied his motion to suppress his statement given to the police because, (1) even though he was effectively in custody, he was not given his *Miranda*[1] rights, and (2) because his statement was involuntary. We disagree.

Whether a defendant's statement was knowing, intelligent, and voluntary is a question of law that a court evaluates under the totality of the circumstances. *People v Cheatham*, 453 Mich 1, 27, 44; 551 NW2d 355 (1996). Deference is given to the trial court's assessment of the weight of the evidence and credibility of the witnesses, and the trial court's findings of fact will not be disturbed unless they are clearly erroneous. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000); *People v Howard*, 226 Mich App 528, 543; 575 NW2d 16 (1997). The trial court's factual findings are clearly erroneous if, after review of the record, this Court is left with a definite and firm conviction that a mistake has been made. *Sexton*, *supra*.

Statements of an accused made *during custodial interrogation* are inadmissible unless the accused voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. *Miranda*, *supra* at 444; *People v Abraham*, 234 Mich App 640, 644; 599 NW2d 736 (1999). However, "[i]t is well settled that *Miranda* warnings need be given only in situations involving a custodial interrogation." *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999). A custodial interrogation occurs when law enforcement initiates questioning of the accused where the

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

accused is in custody or his freedom is otherwise restricted. *Id*. Whether the accused was in custody depends on the totality of the circumstances, and "the key question" is "whether the accused reasonably could have believed that he was not free to leave." *Id*.

Here, it is clear that defendant was not in custody when he gave his statement to the police. Defendant and the officer who took defendant's statement testified at the evidentiary hearing. It is undisputed that the officer left his card at defendant's house requesting a call, and that defendant called and agreed to come into the station on the following day. Although defendant claimed that the officer threatened to arrest him if he did not come, the officer denied that allegation. The trial court believed the officer's testimony, and deference is given to the court's assessment of the credibility of the witnesses. Once at the police station, the officer brought defendant into an office, and informed him that he was not going to be arrested that day and that he would be able to return to work. Although defendant indicated that it seemed like the officer locked the door behind them, he admitted that he was unsure if the door had actually been locked. In response to the question of if he knew why he was there, defendant responded, "because of what happened to the girls." Defendant then gave a statement. The officer denied that he ever told defendant that he was under arrest or otherwise not free to leave. Indeed, defendant conceded that, after the interview, he left the police station and was not arrested until approximately one month later. Because defendant was not in custody when he gave his statement, *Miranda* warnings were not necessary.

We further find that the record does not support defendant's contention that his statement was not voluntary, but induced by police coercion and promises of leniency. Whether a statement was voluntary is determined by examining police conduct, while the determination whether it was made knowingly and intelligently depends in part upon the defendant's capacity. *Howard*, *supra* at 538. In determining whether a statement was admissible, this Court considers the totality of the circumstances surrounding the making of the statement to determine whether it was freely and voluntarily made in light of the factors set forth in *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988).[2]

---

[2] In *Cipriano*, *supra*, our Supreme Court set forth the following nonexhaustive list of factors that a trial court should consider in determining whether a statement is voluntary:

> [T]he age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. [*Id*.]

At the hearing, the officer who took defendant's statement testified that defendant was not threatened, abused, or promised any leniency. As previously noted, the trial court believed the officer's testimony and, besides defendant's claims, there was no evidence indicating the contrary. There was likewise no evidence that defendant was ill, intoxicated, or deprived of sleep, food, or drink. The interview was conducted in the morning and was not prolonged, with interview lasting approximately fifty minutes. Further, the record shows that defendant was thirty-nine years old, had no learning disabilities, and had not been diagnosed with any psychological problems. Although defendant was described as being emotional and nervous, there is no indication that he was extremely distraught such that he was not operating of his own free will. Viewing the totality of the circumstances, the trial court did not clearly err in denying defendant's motion to suppress his statement given to the police.

Defendant next claims that the trial court erred in allowing evidence that he performed other sexual acts against the complainants, because the testimony was unduly prejudicial as it was offered to show that defendant was a bad person. We disagree.

We review a trial court's decision to admit evidence for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would conclude there was no justification or excuse for the ruling. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

The admissibility of evidence of a defendant's other crimes, wrongs, or acts is governed by MRE 404(b). Such evidence is admissible under MRE 404(b) if it is offered for a proper purpose, i.e., one other than to prove the defendant's character or propensity to commit the crime, is relevant to an issue or fact of consequence at trial, and is sufficiently probative to outweigh the danger of unfair prejudice, pursuant to MRE 403. *People v Starr*, 457 Mich 490, 496-497; 577 NW2d 673 (1998); *People v VanderVliet*, 444 Mich 52, 55, 63-64, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). In application, the admissibility of evidence under MRE 404(b) necessarily hinges on the relationship of the elements of the charge, the theories of admissibility, and the defenses asserted. *VanderVliet*, *supra* at 75. Finally, a limiting instruction should be given on request. *Id.*

We conclude that the challenged testimony was admissible under MRE 404(b). The evidence was not simply offered to show that defendant had a bad character. Rather, the testimony was probative of defendant's intent, and common scheme, plan, or system for taking advantage of his nieces while living in their home, to rebut his claim that the complainants fabricated the charges against him, and to assist the jury in weighing the witnesses' credibility. The theories for which the evidence was admissible are legitimate, material, and contested grounds on which to offer the evidence because defendant entered a general denial, thereby placing all elements of his CSC charges at issue. See *VanderVliet*, *supra* at 78. Moreover, the evidence was not inadmissible simply because the very nature of the evidence is prejudicial. The danger that MRE 404(b)(1) seeks to avoid is that of *unfair* prejudice, and defendant has not demonstrated that his was unfairly prejudiced. See *Starr*, *supra* at 499-500. Finally, the trial court gave a limiting instruction to the jury concerning the proper use of the other acts evidence. Accordingly, this claim does not merit reversal.

Defendant further argues that, pursuant to MCR 6.120(B) and (C), he is entitled to a new trial because defense counsel was ineffective by failing to object to the consolidation of the two cases involving two complainants. We disagree.

Because defendant failed to make a testimonial record in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review of this issue is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *Sabin, supra* at 659. To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). "A defendant must also overcome the presumption that the challenged action [or inaction] was trial strategy." *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

MCR 6.120(B) provides in relevant part:

> On the defendant's motion, the court must sever unrelated offenses for separate trials. For purposes of this rule, two offenses are related if they are based on
>
> * * *
>
> (2) *a series of connected acts or acts constituting part of a single scheme or plan*. [Emphasis added.]

Here, even though the CSC allegations were not alleged by the same complainants, the testimony reveals that the separate counts did constitute a series of acts constituting a single scheme or plan. The two complainants are sisters and defendant is their mother's brother. Defendant began sexually assaulting each complainant at approximately the same age, i.e., four or five years old. The alleged acts occurred when defendant lived in the complainants' home, and, at times, when he was babysitting. Defendant touched both complainants on their vaginal area, buttocks, and breasts. Defendant stopped sexually assaulting each complainant between the ages of ten and twelve. We find that this evidence sufficiently establishes that the acts committed against both complainants constituted "part of a single plan or scheme" within the meaning of MCR 6.120(B) on defendant's part to engage in continuous sexual activity with his young nieces in the same household whenever the opportunity arose. See *People v Miller*, 165 Mich App 32, 45; 418 NW2d 668 (1987), remanded on other grounds 434 Mich 915 (1990).

We also note that, under MCR 6.120(C), a trial court is not required to sever related offenses, *People v Duranseau*, 221 Mich App 204, 208; 561 NW2d 111 (1997), and defendant has failed to sufficiently argue that severance was necessary. Accordingly, it is unlikely that the trial court would have denied the prosecution's motion to join the cases involving the two complainants even if defense counsel had objected. Therefore, defendant was not denied the

effective assistance of counsel. See *People v Burnett*, 166 Mich App 741, 752-753; 421 NW2d 278 (1988).[3]

Defendant next argues that the trial court abused its discretion by denying his request to impeach one of the complainants with evidence that, at the time of trial, she was housed in a youth facility home for incorrigibility.

We find no abuse of discretion. Defendant has failed to establish how evidence relating to the complainant's placement in a youth home years after the alleged incidents motivated her to incriminate defendant. MRE 401. In other words, the inferences defendant is trying to draw between the complainant's youth home placement and an alleged motivation to lie is, at best, highly tenuous. See *People v Perkins*, 116 Mich App 624, 629; 323 NW2d 311 (1982). We also note that the complainant's disruptive behavior in these later years, which caused the youth home placement, could tend to support a claim of child sexual abuse rather than refute it.[4] Accordingly, this claim does not merit reversal either.

Defendant also argues that the trial court committed error requiring reversal when it declined to permit the introduction of part of an unsigned statement by an unavailable witness made to an investigator, in which the declarant indicated that the complainants had told their mother they were lying, among other things. We disagree.

We find that the trial court did not abuse its discretion in precluding the evidence, which contained inadmissible hearsay within hearsay. MRE 801(c); *People v Hawkins*, 114 Mich App 714, 719; 319 NW2d 644 (1982). Moreover, even if this evidence was admissible, any error would have been harmless. In order to overcome the presumption that a preserved nonconstitutional error is harmless, a defendant must persuade the reviewing court that it is more probable than not that the error in question was outcome determinative, i.e., the error undermined the reliability of the verdict. *People v Snyder*, 462 Mich 38, 45; 609 NW2d 831 (2000), quoting *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). Here, there was strong evidence of defendant's guilt, including defendant's confession made to the police, an inculpatory and apologetic letter written by defendant to the complainants' mother, and the testimony of the two complainants. Accordingly, defendant has not established that it is more probable than not that the alleged error was outcome determinative. Thus, reversal is not warranted on this basis. *Id.*

---

[3] We note that defense counsel argued at trial that the accusations of criminal sexual abuse were fabricated by the two complainants and stressed inconsistencies in the two complainants' stories. Thus, the decision to allow consolidation may have been a matter of trial strategy. The fact that defense counsel's strategy may not have worked does not constitute ineffective assistance of counsel. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

[4] Indeed, the prosecutor requested to add an expert to testify regarding the characteristics normally found in sexually abused children if the court chose to allow the impeachment evidence. See *People v Peterson*, 450 Mich 349, 352-353; 537 NW2d 857 (1995), amended on other grounds 450 Mich 1212 (1995); *People v Beckley*, 434 Mich 691; 456 NW2d 391 (1990).

Defendant's final claim is that he is entitled to resentencing because the court improperly scored offense variable ("OV") 12, OV 25, and prior record variable ("PRV") 6.[5] Again, we disagree.

A sentencing court has discretion in determining the number of points to be scored provided that evidence of record adequately supports a particular score. See *People v Leversee*, 243 Mich App 337, 349; 622 NW2d 325 (2000); *People v Elliott*, 215 Mich App 259, 261; 544 NW2d 748 (1996). Scoring decisions for which there is any evidence in support will be upheld. See *Elliott*, *supra*.

Defendant challenges the assessment of 50 points for OV 12 (criminal sexual penetrations) on the basis that the jury acquitted him of first-degree criminal sexual conduct, which, according to MCL 750.520b, requires penetration. However, a guidelines scoring decision need only be supported by a preponderance of the evidence. *People v Ratkov (After Remand)*, 201 Mich App 123, 125-126; 505 NW2d 886 (1993), remanded 447 Mich 984 (1994). Because the standard of proof differs from that necessary for a criminal conviction, a fact can be established for the purpose of guidelines calculations even though it was not found for the purpose of conviction. *Id*.; *People v Harris*, 190 Mich App 652, 663; 476 NW2d 767 (1991). Here, both complainants testified that vaginal penetration occurred, and, in his statement, defendant admitted that it was possible that he penetrated the complainants. The trial court found the complainants credible. As a result, the score of 50 points for OV 12 is supportable.

Defendant challenges the assessment of 15 points for OV 25 (three or more contemporaneous criminal acts), arguing that the prosecutor failed to establish exactly when the penetrations occurred. The relevant instruction for OV 25 provides that a criminal act is contemporaneous if (1) it occurs within 24 hours of the offense upon which the offender is being sentenced or within six months if it is identical to or similar in nature, and (2) it has not and will not result in a separate criminal conviction. Michigan Sentencing Guidelines (2d ed, 1988), p 46. Here, there was testimony at trial that the acts were repetitive and occurred within the necessary time frame. Further, defendant has failed to provide any persuasive authority for his claim that a defendant cannot be scored under both OV 12 and OV 25. Accordingly, the score of 15 points for OV 25 is supportable.

In the trial court, defendant challenged the assessment of 15 points for PRV 6 (prior relationship to the criminal justice system), on the basis that defense counsel was not provided verification that defendant was still on probation in May 1991, and because defendant's prior conviction occurred 10 years prior to the instant convictions.[6] The instructions for PRV 6

---

[5] The offenses of which defendant was convicted occurred before January 1, 1999; therefore, the judicial sentencing guidelines apply to this case. MCL 769.34(1); *People v Reynolds*, 240 Mich App 250, 253-254; 611 NW2d 316 (2000).

[6] On appeal, defendant attempts to raise a different challenge to this scoring of PRV 6. However, a party may not raise on appeal a challenge to a guidelines calculation unless he raised it at or before sentencing, unless he shows that the challenge was brought as soon as the inaccuracy could reasonably have been discovered. Any other challenge must be brought by a motion for relief from judgment. MCR 6.429(C).

provide, in relevant part, that 15 points must be assessed against an offender if, at the time of the instant offense, the defendant was on probation. *Id*. at 42. Here, there was testimony that several sexual acts occurred on March 17, 1991. Uncontroverted evidence contained in the presentence investigation report provided that defendant was convicted of having an unlawful blood alcohol level, MCL 257.625(1)(b), in the 44th District Court on November 27, 1990, and sentenced to one-year probation. As a result, the score of 15 points for PRV 6 is also supportable.

Because the record contained adequate evidence to support the challenged scoring decisions, the trial court did not abuse its discretion in scoring OV 12, OV 25, and PRV 6.

Affirmed.

/s/ Peter D. O'Connell
/s/ Richard Allen Griffin
/s/ Joel P. Hoekstra